(1)

No. 94-1471

In the Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION, PETITIONER

v.

CHARLES HOWE, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether employee benefit plan participants and beneficiaries have a cause of action on their own behalf for equitable relief, under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), to redress violations of the fiduciary responsibility provisions of the Act.

2. Whether Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A), imposes on a plan fiduciary who is also an employer a duty to the plan's participants and beneficiaries to avoid misrepresenting to them material information relating to the plan.

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INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for interpreting and enforcing the fiduciary obligation provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1169 (1988 & Supp. V 1993), and he is authorized to seek equitable relief under Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), which mirrors the private enforcement provision at issue in this case.

STATEMENT

1. During the period relevant to this case, petitioner sold and distributed farm machinery and related parts through its wholly owned subsidiary, Massey-Ferguson, Inc. (M-F). Pet. App. 50a; see Pet. ii. In 1978, M-F established an unfunded, self-insured employee welfare benefit plan (Plan), through which it provided to its active and retired employees certain life insurance, health and major medical benefits. Pet. App. 3a, 66a. M-F was the admin-

istrator and the named fiduciary of the Plan. See 29 U.S.C. 1002(21)(A). Because it controlled M-F, petitioner was also a Plan fiduciary. Pet. App. 17a n.4, 78a-79a.

The provisions of the Plan were set forth in a formal legal document entitled "Massey-Ferguson, Inc. Employee Benefits Plan and Trust," Pet. App. 3a, which was not distributed to the employees, *id.* at 71a. The employees received a 200-page summary plan description captioned "You and Massey Ferguson" (*You & M-F*). *Id.* at 66a, 109a-112a; see 29 U.S.C. 1022, 1024 (1988 & Supp. V 1993). Although Section 7.4 of the formal Plan document reserved M-F's right, "by action of the Board, to amend or terminate the Plan or Trust at any time," Pet. App. 9a, *You & M-F* did not disclose that the Plan could be amended or terminated, *id.* at 72a. The district court found that respondents, as well as M-F's former president and other company officials, understood from language in *You & M-F* and from past company practice that benefits received upon retirement would continue for life. *Id.* at 70a-71a.[1]

In May 1986, petitioner transferred parts of several M-F divisions to a newly formed subsidiary, Massey Combines

[1] In December 1983, M-F distributed to its employees and retirees a memorandum describing a newly adopted "Comprehensive Major Medical Plan" (CMMP). Pet. App. 110a; see Pet. C.A. App. 545-569, 571-595. The memorandum contained, at the bottom of a schedule of benefits, a statement of M-F's right to "terminate, suspend, withdraw, amend or modify the plan," *id.* at 551, 577. Although the memorandum constituted a "Summary of Material Modifications" within the meaning of Section 102(a) of ERISA, 29 U.S.C. 1022(a), see Pet. App. 74a-75a, the district court found it deficient, because it was not written "in a manner calculated to be understood by the average plan participant," *id.* at 111a (quoting 29 C.F.R. 2520.102-2(a) (1988)). The court concluded that "a reasonable person * * * would not understand [from the memorandum] that defendants were reserving a right to terminate welfare benefits in retirement." Pet. App. 111a; see *id.* at 75a-76a.

Corporation (MCC). Pet. App. 2a, 53a, 57a-58a, 62a.[2] That corporate reorganization was effected to permit petitioner to avoid reporting in its consolidated financial statements significant losses that it was sustaining in the transferred businesses, *id.* at 86a-87a, and to "rid [petitioner] of substantial obligations for employee benefits due or to become due to workers" in those businesses, *id.* at 2a, 52a-54a. To the latter end, petitioner purported to transfer to MCC the responsibility for affording welfare benefits to approximately 4000 employees who had previously retired from M-F—without notifying the affected retirees. *Id.* at 3a, 51a-52a, 57a, 65a.

As part of the corporate reorganization, approximately 1500 active M-F employees were also moved to MCC. Although petitioner could have discharged those employees from M-F and then rehired any who wished to work at MCC, it instead sought the employees' consent to a transfer, hoping thereby to avoid claims for termination pay, and to shift to MCC the responsibility of providing retiree welfare benefits to those employees who were already eligible to retire or who would soon be retiring. Pet. App. 57a, 62a-63a. Petitioner explained the reorganization to the affected employees in a 30-minute meeting held at M-F's corporate headquarters in Des Moines, Iowa, and requested that each employee sign and submit his or her written acceptance by the close of the meeting. *Id.* at 63a. The presentation was designed to be "light, upbeat,

[2] Petitioner owned 45% of MCC's outstanding shares. The remaining shares were issued to the Canadian Imperial Bank of Commerce (35%) and the Canadian government (20%), in consideration for their forbearance on loans made to petitioner. Pet. App. 58a. Petitioner controlled the board of directors of MCC, *id.* at 83a, and the district court found that petitioner was MCC's alter ego, *id.* at 82a-83a. Petitioner did not dispute that finding on appeal. *Id.* at 10a n.3.

and positive," so as to "encourage [the employees] to sign the acceptance." *Ibid.*; see Resp. C.A. App. 65-66.

The employees were provided with a side-by-side comparison of benefits coverage, which indicated that MCC's benefits would be identical to those provided under the M-F Plan, J.A. 68-73, and were told that, when they transferred, "benefit programs w[ould] remain unchanged," J.A. 75, 80, 82.[3] Although petitioner stated that "[e]mployment conditions in the future will depend on our ability to make [MCC] a success," J.A. 76, it asserted that MCC had a "bright future" and that the "financial restructuring [that] created [MCC] . . . [would] provide the funds necessary to ensure its future viability," Pet. App. 3a; J.A. 80.[4] In fact, it was questionable whether MCC qualified as a going concern, Pet. App. 56a; on the day it was created, MCC's liabilities exceeded its assets by at least $46 million, and from the outset MCC's executives "openly discussed * * * that MCC could not survive," *ibid.*

In March 1988, MCC went into receivership in Canada and ceased providing welfare benefits. Pet. App. 52a.[5] The

[3] To avoid discouraging transfers, petitioner chose not to state that welfare benefits would "initially" remain unchanged, and not to disclose that the MCC Plan could be amended or terminated at any time. Pet. App. 4a-5a, 64a-65a.

[4] In addition, knowing that the employees' potential eligibility for termination pay and early retirement from M-F figured into their decisions whether to accept employment at MCC, Pet. App. 4a; J.A. 65, petitioner told the employees that "[t]echnically" they already worked for MCC, and that their written acceptances were necessary only "to ensure uninterrupted continuation of * * * pay and benefits," J.A. 76, 83; see J.A. 75.

[5] MCC had adopted the provisions of the M-F Plan for its own welfare benefits plan, Pet. App. 76a, and the MCC Plan was administered by M-F, *id.* at 61a. Petitioner was found to have been an MCC Plan fiduciary. *Id.* at 17a n.4, 78a-79a.

M-F retirees whose benefits obligations had been transferred to MCC first learned of that purported transfer when they stopped receiving their welfare benefits. *Id.* at 6a, 65a.

2. Respondents are (i) ten of the individuals who retired from M-F and were purportedly transferred as beneficiaries to the MCC Plan, and (ii) a class comprised of former M-F employees who transferred to MCC, retired from MCC, and lost their retiree welfare benefits when MCC failed (the Retired Class). Pet. App. 6a, 52a. Respondents filed suit against petitioner and M-F, stating claims under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), for retiree welfare benefits allegedly owed them under the Plan; equitable relief under Section 502(a)(3), 29 U.S.C. 1132(a)(3), for breach of fiduciary duties (in violation of Section 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A)) and interference with protected rights (in violation of Section 510, 29 U.S.C. 1140); estoppel; and common law fraudulent misrepresentation.

The district court found petitioner liable for breach of fiduciary duty, interference with protected rights, and equitable estoppel, and entered judgment for damages of $7.6 million for the Retired Class and $712,332 for the individual plaintiffs. Pet. App. 24a-25a, 46a-47a.[6] Noting that "a fiduciary owes strict duties running *directly to the*

[6] The district court held that respondents' claim for welfare benefits was precluded by the reservation of rights contained in the formal Plan document, Pet. App. 32a-36a, and that their fraudulent misrepresentation claim was preempted by ERISA, *id.* at 44a-45a. The court also rejected the claims brought on behalf of a class of employees who transferred to MCC and lost their jobs without termination pay when MCC failed (the Terminated Class), on the ground that M-F's severance policy created no contractual right to termination pay. *Id.* at 37a. Finally, the court struck the punitive damages award. See *id.* at 45a, 113a. The court of appeals affirmed those rulings, *id.* at 10a, and their merits are not before this Court.

trust beneficiaries," the court held that Section 502(a)(3) of ERISA provides plan participants and beneficiaries with a cause of action for individual relief for breach of fiduciary duty. Pet. App. 94a. The court found that petitioner breached its fiduciary duties to the Retired Class "[b]y making material misrepresentations and omissions * * * in connection with the prospective transfer of those plaintiffs' employment and benefit rights to MCC, including the misrepresentation of MCC's prospects for success and the failure to disclose its probable failure and the effect thereof on plaintiffs' benefits." *Id.* at 96a. The court found that petitioner breached its duties to the individual plaintiffs "[b]y attempting a facially invalid unilateral assignment of [their] benefit rights * * * from the M-F Plan to the MCC Plan." *Ibid.*

3. The court of appeals affirmed the district court's rulings respecting petitioner's liability for breach of its fiduciary duties,[7] but modified the relief awarded. Pet. App. 1a-21a. The court rejected petitioner's argument that, under *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985), participants and beneficiaries may not sue on their own behalf under Section 502(a)(3) for harm caused them by a breach of fiduciary duties. *Russell*, the court observed, established only that participants and beneficiaries may not raise individual claims under Section 502(a)(2) of the Act, which authorizes only plan-based relief. Noting that Section 502(a)(3) (which contains no similar limitation) broadly authorizes "appropriate equitable relief * * * to redress" statutory violations, the court held that a participant or beneficiary who suffers harm as a result of a fiduciary breach may sue under Section 502(a)(3) for individualized equitable relief. Pet. App. 14a-15a.

[7] The court did not address the judgment on respondents' claims of estoppel and interference with protected rights. Pet. App. 17a n.5.

The court also rejected petitioner's argument that its intentional misstatements were not actionable because they were made by petitioner in its capacity as employer, not as plan fiduciary.[8] The court acknowledged that petitioner's decision to effect the 1986 reorganization did not implicate its duty of loyalty, Pet. App. 12a-13a, but distinguished that sort of business decision from a misrepresentation of facts regarding plan administration, which constitutes a clear breach of fiduciary duties, *id.* at 13a.

Finally, the court vacated respondents' damage awards in light of *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), which held that money damages are not "appropriate equitable relief" available under Section 502(a)(3). Pet. App. 18a. The court concluded, however, that respondents were entitled to restitution in an amount equal to the welfare benefits that petitioner would have paid them but for its fiduciary breach; that the Retired Class was entitled to an injunction reinstating its members to the M-F Plan as it existed at the time of their retirement from MCC; and that the individual plaintiffs were entitled to an injunction reinstating them to the M-F Plan as it existed at the time they were "transferred" to the MCC Plan. *Ibid.*[9]

[8] Petitioner did not contest the district court's findings of fact, Pet. App. 2a, and did not dispute that its misstatements constituted "a breach of fiduciary duty in the generic sense," *id.* at 12a (citing *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries.")).

[9] Judge Hansen dissented on the issue of relief. Pet. App. 19a-21a. In his view, the court erred in fashioning an equitable remedy without the benefit of briefing and argument on that issue, and its award was more akin to consequential legal damages than to restitution. In our view, the award may properly be regarded as restitutionary because M-F, a self-insurer, was wrongfully enriched by the amount of benefits that it failed to pay respondents. See Restatement of Restitution § 1

SUMMARY OF ARGUMENT

I. Section 502(a)(3) of ERISA authorizes a plan participant or beneficiary to sue "to obtain * * * appropriate equitable relief * * * to redress * * * violations" of the Act's fiduciary responsibility provisions. One of those provisions, Section 404(a)(1), requires plan fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." When a breach of that duty inflicts distinct injuries on individual participants or beneficiaries, the breach is "appropriate[ly] * * * redress[ed]" through the provision of individualized equitable relief. Congress's provision in Sections 409(a) and 502(a)(2) of the Act of express, make-whole remedies for plans harmed by fiduciary breaches does not reflect a congressional determination to preclude individualized equitable relief under Section 502(a)(3) when participants or beneficiaries suffer distinct harms from fiduciary misconduct.

II. Congress looked to the law of trusts for delineation of the substance and scope of the fiduciary duties it imposed on plan fiduciaries. At common law, the duty of loyalty incorporated a duty of candor, which required a trustee who dealt with a beneficiary to do so in the utmost good faith, to provide the beneficiary with complete and correct information relating to the transaction, and to forbear from making material misstatements relating to the beneficiary's interests. A breach of candor rendered the transaction voidable by the beneficiary. The same concerns for abuse and overreaching that informed the duty of candor at common law apply to dealings between ERISA fiduciaries and plan participants and beneficiaries.

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cmt. b, at 12 (1937). In any event, petitioner has not challenged the equitable nature of the relief ordered by the court of appeals.

An employer who also serves as a plan fiduciary is a fiduciary "to the extent" that the employer acts within the scope of its fiduciary authority or responsibilities. 29 U.S.C. 1002(1). When such an employer makes a misstatement that foreseeably affects a participant's or beneficiary's choices under a plan or otherwise respecting plan benefits, the communication should be viewed in context to determine whether a reasonable participant would have understood the employer to be communicating in its capacity as a plan fiduciary. And when, as in this case, the employer conflates its roles by addressing in a single communication matters of plan administration and nonplan matters that have a direct bearing on plan benefits, the employer runs (and should bear) the risk that it will be understood to have spoken throughout as a fiduciary.

ARGUMENT

I. SECTION 502(a)(3) OF ERISA AUTHORIZES PLAN PARTICIPANTS AND BENEFICIARIES TO OBTAIN RELIEF ON THEIR OWN BEHALF FOR BREACHES OF THE FIDUCIARY DUTIES CODIFIED IN SECTION 404(a)(1)

Section 502(a)(3) of ERISA authorizes suit "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). Petitioner argues (Pet. Br. 16-29) that, notwithstanding its unqualified text, Section 502(a)(3) should not be read to authorize individualized relief for violations of the Act's fiduciary responsibility provisions. That argument is without merit.

1. Section 502(a)(3) authorizes "a participant [or] beneficiary" to obtain appropriate equitable relief to redress

"*any* act or practice which violates *any* provision of this subchapter." 29 U.S.C. 1132(a)(3) (emphasis added). The referenced "subchapter" is Subchapter I of Chapter 18 of Title 29 (29 U.S.C. 1001-1169 (1988 & Supp. V 1993)), which includes ERISA's fiduciary responsibility provisions, 29 U.S.C. 1101-1112 (1988 & Supp. V 1993). A violation of any of those provisions is therefore an "act or practice" for which Section 502(a)(3) provides relief. See *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2068 n.5 (1993).

Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A), states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries." This Court has recognized that Congress intended through that provision to codify the strict duty of loyalty that traditionally applied to trustees in their conduct towards trust beneficiaries. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570-571 (1985); see also S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973). The text of the provision makes clear that under ERISA, as at common law,[10] a fiduciary's duty of loyalty runs directly to individual participants and beneficiaries. See *Massachusetts Mut. Life*

[10] Under the law of trusts, a trustee's duty of loyalty ran directly to the beneficiary. See Restatement (Second) of Trusts § 170(1), at 364 (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."); accord G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 543, at 218 (2d ed. rev. 1993); 2A W.F. Fratcher, *The Law of Trusts* § 170, at 311 (4th ed. 1987); see also *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 152-153 (1985) (Brennan, J., concurring in the judgment) ("[I]t is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.").

Ins. Co. v. *Russell*, 473 U.S. 134, 142 (1985) ("It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries.").[11] When a breach of that duty causes distinct harm to individual participants or beneficiaries, the breach is "appropriate[ly]" subject, under Section 502(a)(3), to suit by the injured individuals for equitable relief.

2. Recognition of a cause of action to redress individual harms caused by fiduciary misconduct is consistent with Congress's purpose, set forth in the text of ERISA, "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). In explaining the need to codify fiduciary standards in federal law, the committee reports stressed that "without standards by which a participant can measure the fiduciary's conduct * * * he is not equipped to safeguard either *his own rights* or the plan assets." S. Rep. No. 127, *supra*, at 29 (emphasis added); see also *id.* at 27 ("[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that *individual participants and beneficiaries will be armed with enough information*

[11] It is notable, in that regard, that Section 404(a) refers to a fiduciary's duties "with respect to a plan," a phrase that is most naturally read to extend the requirement of loyalty to all of a fiduciary's plan-related functions. See *Webster's Third New International Dictionary* 1934 (1986) (equating "respect to" with "regard or reference to" and "concerned with"); cf. *Smith* v. *United States*, 113 S. Ct. 2050, 2058-2059 (1993). If Congress had intended through that provision to restrict a fiduciary's duty of loyalty "to the plan" itself, Congress presumably would have used narrower language to that effect.

to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.") (emphasis added); accord H.R. Rep. No. 533, *supra*, at 11, 12.

3. Petitioner concedes (Pet. Br. 23) that Section 404 of the Act imposes on fiduciaries a duty of loyalty to participants and beneficiaries. Accord Chamber of Commerce Amicus Br. (Chamber Br.) 17-18 (acknowledging that misrepresentation to individual employee about benefit coverage violates fiduciary duty under ERISA). Petitioner's amici further concede, and petitioner does not dispute, that "the language of section 502(a)(3) might literally be read" to authorize individualized equitable relief for a violation of that duty. Chamber Br. 9; Eastman Kodak Co. et al. Amici Br. (Kodak Br.) 7. Petitioner contends (Pet. Br. 17-29), however, that recognition of an individualized cause of action for breach of fiduciary duties under Section 502(a)(3) would be inconsistent with Congress's provision of plan-based remedies for fiduciary breaches in Sections 409(a) and 502(a)(2). Petitioner misapprehends the statutory scheme.

Section 502(a)(2) authorizes an action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [Section 409 of the Act]." 29 U.S.C. 1132(a)(2). Section 409(a) (entitled "Liability for breach of fiduciary duty") provides in turn that a fiduciary with respect to a plan who breaches the fiduciary duties imposed by the Act

> shall be personally liable *to make good to such plan* any losses to the plan resulting from each such breach, and *to restore to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. 1109(a) (emphasis added). In *Russell*, the Court, relying largely on Section 409(a)'s express limitation of its remedies "to the plan," concluded that Section 409(a)'s reference to "other equitable or remedial relief" authorizes only "plan-related" relief, and does not authorize relief to an individual beneficiary. 473 U.S. at 140-142.[12]

Contrary to petitioner's contention (Pet. Br. 17), *Russell* does not "compel[]" the restrictive reading of Section 502(a)(3) that petitioner urges. Because the beneficiary in *Russell* sued exclusively under Sections 409(a) and 502(a)(2), and disclaimed reliance on Section 502(a)(3), this Court left open the question whether "any other provision of ERISA" might provide the relief requested. See 473 U.S. at 139 n.5; *id.* at 150 (Brennan, J., concurring in the judgment). Moreover, the holding in *Russell* was based principally on the text of Section 409(a), which is incorporated by reference in Section 502(a)(2). That text stands in marked contrast to Section 502(a)(3), which contains no comparable language indicating that relief is confined to the plan itself. See *Russell*, 473 U.S. at 150 (Brennan, J., concurring in the judgment).

Citing the maxim that "the specific governs over the general," petitioner argues (Pet. Br. 21-22) that Congress's specific provision for plan-based relief in Sections 409(a) and 502(a)(2) precludes by implication the availability of individualized relief for fiduciary breaches under Section 502(a)(3). That maxim does not assist petitioner. Section 409(a) "specific[ally] governs" only the subject of relief to the plan. It does not govern the distinct subject of appropriate relief for individual participants or beneficiaries, which *does* fall within the language of Section 502(a)(3).

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[12] In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right under Sections 409(a) and 502(a)(2) to recover compensatory and punitive damages.

A specific provision should be understood to limit the reach of a general one if applying the text of both provisions creates a conflict or other dissonance in the statutory scheme. Here, however, there is no incongruity in providing both make-whole relief to plans under Sections 409(a) and 502(a)(2), and individualized equitable relief to participants and beneficiaries who suffer distinct harms under Section 502(a)(3). This is not a circumstance in which application of a general rule produces a result that conflicts with the mandate of a more specific rule. See, *e.g.*, *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961); *Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 353 U.S. 222 (1957). Notwithstanding petitioner's contrary view (Pet. Br. 21), although Sections 409(a) and 502(a)(2) do not themselves affirmatively authorize individualized relief for fiduciary misconduct, neither do those provisions affirmatively foreclose such relief under other provisions of the Act.

Nor is this a circumstance in which giving full scope to a general rule would render an assertedly more specific rule superfluous. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 106-107 (1944). Under our interpretation, each of the pertinent enforcement provisions retains discrete functions for remedying fiduciary breaches: Section 502(a)(2) authorizes monetary recovery to compensate for a plan's losses (as well as equitable relief on behalf of the plan itself), whereas Section 502(a)(3) authorizes more limited relief—equitable only—running to individual participants or beneficiaries.

Finally, application of Section 502(a)(3) according to its express terms would not disrupt a comprehensive scheme that governs a discrete subset of cases. See, *e.g.*, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981); cf. *Russell*, 473 U.S. at 143-144. To be sure, in drafting the Act's fiduciary provisions, Congress codified many specific rules

regulating the administration of plans as entities, the investment of plan assets, and dealings between fiduciaries and plans. See, *e.g.*, 29 U.S.C. 1102, 1104(a)(1)(C), 1106(b), 1107, 1133 (1988 & Supp. V 1993). Congress's specific attention to those matters is understandable: Misuse of plan assets and investments directly harms a plan, and thereby puts at risk the collective interests of its participants and beneficiaries. In addition, however, Congress also codified a strict duty of loyalty, and fiduciaries' violations of that duty will in some instances inflict distinct injuries on participants or beneficiaries without affecting the plan as a whole. See *Bixler* v. *Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993). In instances of affirmative misrepresentation to plan participants, as in this case, the harm caused by the fiduciary's breach is particularly likely to be individualized. See, *e.g.*, *Mullins* v. *Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994) (misrepresentation by employer of its intentions regarding future changes in plan's early retirement benefits); *Anweiler* v. *American Elec. Power Serv. Corp.*, 3 F.3d 986 (7th Cir. 1993) (same); see also Kodak Br. 23 (citing examples); Chamber Br. 17-18 (same).[13]

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[13] A breach of fiduciary duties may cause distinct harm to individuals in other contexts as well. For example, where a sponsor gives the trustees of a multiemployer pension plan discretionary power to set eligibility levels, most courts have held the trustees to ERISA fiduciary standards in their exercise of that power. See, *e.g.*, *Mahoney* v. *Board of Trustees*, 973 F.2d 968, 970-973 (1st Cir. 1992) (Breyer, C.J.); *Elser* v. *I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 652-653 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983); but see *Pope* v. *Central States Southeast & Southwest Areas Health & Welfare Fund*, 27 F.3d 211, 213 (6th Cir. 1994). When the trustees act arbitrarily and capriciously in setting benefit rules that disfavor a particular class of participants, the courts have generally permitted the disadvantaged class to assert a claim of fiduciary breach against the trustees and seek reformation of

The provision of broad, make-whole remedies in Section 409(a) indicates that its drafters "were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142. That understanding of Section 409(a) (and therefore of Section 502(a)(2)), however, does not commend (much less compel) a restrictive reading of Section 502(a)(3) that fails to afford participants and beneficiaries the limited equitable relief that is available to them under the quite different text of that Section. *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 371 (1986). To the contrary, because Section 409(a) provides redress only for injuries to the plan, a failure to permit suit under Section 502(a)(3) to redress individualized harms resulting from breaches of the duty of loyalty owed directly to participants and beneficiaries would create an anomalous gap in an otherwise comprehensive enforcement scheme.[14]

Contrary to petitioner's assertion, Pet. 12, affording individuals relief for fiduciary breaches under Section 502(a)(3) does not transgress the principle that "where a

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the plan. *Elser*, 684 F.2d at 652, 658; *Deak* v. *Masters, Mates & Pilots Pension Plan*, 821 F.2d 572, 581 (11th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1038-1039 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

[14] ERISA's legislative history does not point to a contrary reading. Petitioner notes that the "other appropriate equitable relief" provision in Section 502(a)(3) appeared in the bill well after the provisions for plan-based relief for breach of fiduciary duties were first introduced. Petitioner infers from that sequence that Section 502(a)(3) was not intended to afford redress for fiduciary violations. Pet. Br. 26-27. The drafting sequence is, however, equally susceptible to an inference that the lack of any cause of action for redress of individual harms from fiduciary breaches was one of the statutory gaps that the general provision for equitable relief under Section 502(a)(3) was meant to fill.

statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Russell*, 473 U.S. at 147. The Court invoked that principle in *Russell* in response to the respondent's suggestion that the Court recognize an implied private right of action for extra-contractual damages, *id.* at 145-148; and it noted that principle in *Mertens*, when discussing whether the absence of an express duty on the part of nonfiduciaries to avoid participation in fiduciary breaches militated against recognition of such a duty by implication, 113 S. Ct. at 2067. That principle has no application in this case, because Section 502(a)(3) *expressly* authorizes a cause of action for equitable relief for violations of the Act, and Section 404(a)(1)(A) *expressly* imposes on fiduciaries a duty of loyalty to participants and beneficiaries.[15]

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[15] The Pension Annuitants Protection Act of 1994 (PAPA), Pub. L. No. 103-401, § 2, 108 Stat. 4172, amended Section 502 by adding a new subsection (a)(9), which grants annuitants standing to bring suit and obtain relief (including money damages) for breaches of fiduciary duty in connection with fiduciaries' purchase of termination annuities. Congress passed PAPA in the wake of the collapse of the Executive Life Insurance Company of California, in response to decisions by some courts that employees and retirees whose plans had been terminated and replaced with Executive Life annuities "[were] not plan participants and therefore lack[ed] standing under ERISA to challenge the decision of the plan fiduciary to dispose of plan assets by purchasing [those] annuities." H.R. Rep. No. 872, 103d Cong., 2d Sess. 43 (1994); see, *e.g.*, *Kayes* v. *Pacific Lumber Co.*, Nos. C-89-3500 SBA & C-91-1812 SBA, 1993 U.S. Dist. LEXIS 7280 (N.D. Cal. May 17, 1993), aff'd in part, rev'd in part, and remanded, 51 F.3d 1449 (9th Cir. 1995). The legislation was also prompted by a concern that Section 502(a)(3) would not be interpreted to authorize monetary relief for annuitants affected by those sorts of breaches. H.R. Rep. No. 872, *supra*, at 41-43. PAPA does not affect the proper resolution of the question in this case. See PAPA § 4, 108 Stat. 4172 ("Nothing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a) of [ERISA].").

4. Finally, petitioner falls back on the proposition (Pet. Br. 17-18) that the "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs" requires a balancing of interests, *Mertens*, 113 S. Ct. at 2072, and objects that suits for individualized equitable relief for fiduciary breaches may increase overall plan costs. It was Congress, however, that imposed on fiduciaries a substantive duty of loyalty to plan participants and beneficiaries, and provided a cause of action for equitable relief to redress violations of that and other provisions of the Act. Giving effect to the text of Section 502(a)(3) that authorizes equitable (but not compensatory) relief in these circumstances implements the balance of interests struck by Congress.

II. SECTION 404(a)(1)(A) OF ERISA IMPOSES ON AN EMPLOYER, IN THOSE CONTEXTS IN WHICH IT ACTS AS A PLAN FIDUCIARY, A DUTY NOT TO MISREPRESENT TO PARTICIPANTS AND BENEFICIARIES MATERIAL INFORMATION RELATING TO A PLAN[16]

When Congress codified in Section 404(a)(1)(A) of ERISA a fiduciary duty of loyalty to plan participants and beneficiaries, it did not attempt to specify all of the requirements and limitations that follow from it. Instead, Congress "invoked the common law of trusts to define the general scope of [the duty]." *Central States*, 472 U.S. at 570; accord *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). By reference to principles well established at common law, and consistent with the text and overall structure of ERISA, the Secretary of Labor interprets Section 404(a)(1)(A) to forbid an employer who also serves as a plan fiduciary from intentionally misrepresenting to participants or beneficiaries information that may foreseeably affect their choices under or relating to a plan, when that employer has a financial interest in the outcome and communicates in a context in which it would reasonably be viewed to be speaking in its capacity as a plan fiduciary. The Secretary's interpretation is reasonable and entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[17]

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[16] The Court's resolution of this issue should not affect the judgment obtained by the individual plaintiffs. Although the court of appeals held that the individual plaintiffs were entitled to relief under Section 502(a)(3) for "a clear breach of fiduciary duty in violation of" Section 404(a)(1), Pet. App. 17a, the harm to those plaintiffs does not appear to have resulted from any miscommunications by petitioner. Rather, when petitioner disavowed its obligation to provide the individual plaintiffs' welfare benefits, it breached its obligation under Section 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D) (Supp. V 1993), to "discharge [its] duties * * * in accordance with the documents and instruments governing the plan," because petitioner had no right under the M-F Plan unilaterally to transfer individual employees to another benefit plan. Pet. App. 76a, 96a.

[17] Petitioner's amici argue, based on *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988), that when the Secretary's interpretation is offered for the first time in an amicus brief, it merits no deference. Kodak Br. 12 n.4. *Georgetown* does not support that proposition. In *Georgetown*, counsel offered a new interpretation of the regulation at issue in the course of litigation to which the agency was a party, and the interpretation that counsel offered was at odds both with the agency's characterization of the regulation at the time of its promulgation, and with the agency's prior interpretation of the underlying statute. In refusing to accord counsel's interpretation deference, this Court acted in a manner consistent with its longstanding refusal to defer to "'litigating positions' * * * when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court." *Martin* v. *OSHRC*, 499 U.S. 144, 156 (1991). When, as in this case, an agency offers its view as amicus curiae, both its determination to participate in the case and its legal position may properly be viewed as considered decisions of the agency, not "*post hoc* rationalizations" or mere "litigating

1. At common law, the courts recognized that "[i]f the beneficiary [was] to be able to hold the trustee to proper standards of care and honesty * * *, he must know of what the trust property consists and how it is being managed." G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 961, at 2-3 (2d ed. rev. 1993). Accordingly, a trustee had a "duty to inform the beneficiary of important matters concerning the trust and * * * the beneficiary [was] entitled to demand of the trustee all information about the trust and its execution for which he ha[d] any reasonable use." *Id.* at 3; see 2A W.F. Fratcher, *The Law of Trusts* § 173, at 462-464 (4th ed. 1987). ERISA's detailed reporting and disclosure provisions, see 29 U.S.C. 1021-1031 (1988 & Supp. V 1993), correlate with, and in some respects expand upon, those common law obligations.

The common law trustee took on additional disclosure obligations when he dealt (in his personal capacity) with a trust beneficiary, for example, in connection with a sale by a beneficiary to the trustee of the former's interest in the trust. Because "[t]he trustee may have information about the trust property known to no one else," and "[t]he beneficiary will naturally rely on the fairness and frankness of the trustee in effecting such a sale," transactions between trustee and beneficiary presented "great opportunity for the exercise of fraud and undue influence." Bogert, *supra*, § 544, at 456. Thus, when a trustee dealt with a beneficiary, he was required to exercise "utmost

positions." This Court has previously accorded deference to an agency's view of its regulations first stated in an amicus brief. See *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988). Similar considerations militate in favor of deference here to the Secretary's interpretation of the scope of an employer-fiduciary's duty of loyalty, particularly because the Act provides little express guidance on the matter, and its resolution requires a careful balancing of statutory objectives. See *Chevron*, 467 U.S. at 843-845.

candor and fair play," G. Bogert, *Trusts* § 96, at 348 (6th ed. 1987) (*Trusts*), and to inform the beneficiary of "all the facts which would naturally influence the beneficiary to accept or reject the proposal," *id.* at 350. See also Restatement (Second) of Trusts, *supra*, § 173 cmt. d, at 378. Such transactions were voidable by the beneficiary, unless the trustee could establish, among other things, that he acted in good faith, made "a full disclosure[,] and did not induce the sale by taking advantage of his relation to the beneficiar[y] or by other improper conduct." Fratcher, *supra*, § 170.1, at 317; see Bogert, *supra*, § 544, at 457. Actual misrepresentation by the trustee automatically rendered the transaction voidable or subject to the remedy of a constructive trust. *Id.* at 462 n.13.

2. The reasons for applying a heightened duty of candor in connection with trustees' dealings with beneficiaries apply with equal force to fiduciaries' dealings with participants and beneficiaries under ERISA. Just as a trust beneficiary relies on the trustee for correct and complete information respecting the trust, a participant relies on the plan's fiduciaries for complete and accurate information respecting the plan. See S. Rep. No. 127, *supra*, at 28 ("A fiduciary is one who occupies a position of confidence or trust."); H.R. Rep. No. 533, *supra*, at 11 (same).

Petitioner correctly recognizes (Br. 36-40) that any analysis of affirmative disclosure obligations arising from the duty of loyalty should take into account Congress's codification in ERISA of "a comprehensive set of 'reporting and disclosure' requirements." *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1230 (1995).[18] This case,

[18] We do not agree with petitioner's view that the existence under ERISA of specific reporting and disclosure requirements precludes recognition of any affirmative disclosure obligations arising from the duty of loyalty. See *Acosta* v. *Pacific Enters.*, 950 F.2d 611, 618 (9th

however, does not call for such an analysis, because the courts below found that petitioner engaged in affirmative deceit.[19] The district court found, specifically, that petitioner made "representations * * * regarding the potential financial viability of MCC, MCC's business outlook, and the employee benefits [that] were materially misleading"; that "[petitioner] knew the representations were materially misleading when they were made"; and that "[respondents] relied on these representations to their

Cir. 1991); *Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990) ("A fiduciary's duty * * * is not discharged simply by the issuance and dissemination of these [mandatory] documents and notices."). The disclosure and reporting requirements under ERISA are rough counterparts to trustees' common law obligations to provide beneficiaries with an accounting and with basic information respecting the administration of the trust. See p. 20, *supra*. Those requirements do not, however, purport to address the special concerns that arise when a fiduciary deals with a participant or beneficiary. They therefore do not preclude by implication an interpretation of Section 404(a)(1), consistent with its common law antecedents, that imposes a duty of candor in that situation. It is noteworthy, in that respect, that the trustee's general duty to furnish information co-existed at common law with the heightened duty of candor.

[19] The question whether the duty of loyalty itself imposes an affirmative duty to disclose material information has arisen in a variety of contexts. For example, although the courts have affirmed that fiduciaries have a loyalty-based duty, in response to a particularized inquiry, to provide "complete and correct material information on [the participant's] status and options," *Eddy*, 919 F.2d at 750; *Bixler*, 12 F.3d at 1298, they have been generally resistant to requiring, under the duty of loyalty, more prompt notice of plan changes than is expressly required by 29 U.S.C. 1024(b)(1) (1988 & Supp. V 1993), see, *e.g.*, *Porto* v. *Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987), cert. denied, 485 U.S. 937 (1988). The differing textual, common law, and policy concerns that come into play in various contexts counsel against an attempt to fashion a unitary answer, particularly in a case involving affirmative misstatements.

detriment." Pet. App. 65a. To the extent that the court dealt with omissions, the ones it cited—concerning petitioner's knowledge of MCC's poor financial condition and dismal prospects, MCC's right to modify or terminate its welfare plan, and the likelihood that welfare benefits paid by MCC would be reduced or discontinued—were inextricably tied to affirmative misrepresentations that it made on the same subjects.[20]

The duty of loyalty under ERISA incorporates the common law prohibition of intentional misrepresentation. See *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."); *Fischer* v. *Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.) ("Put simply, when a plan administrator speaks, it must speak truthfully."), cert. denied, 114 S. Ct. 622 (1993). Moreover, just as the common law duty of candor extended to those "facts which would naturally influence the beneficiary to accept or reject [a trustee's proposal to acquire the beneficiary's interest in the trust]," *Trusts*, *supra*, § 96, at 350, the duty of loyalty under Section 404(a)(1)(A) proscribes the intentional misstatement of "facts which would naturally influence" a choice that a fiduciary with a financial interest in the outcome asks an employee to make under or with respect to a benefit plan. Indeed, the courts of appeals that have considered the

[20] Cf. *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 94-1875, 1995 WL 380983, at *6 (3d Cir. June 28, 1995) ("[T]his is not a case involving an employer's 'duty to remind.' Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures.").

matter uniformly have held that material misrepresentations are inconsistent with a fiduciary's duty of loyalty under the Act. See *Mullins*, 23 F.3d at 669; *Unisys Corp.*, No. 94-1875, 1995 WL 380983, at *4-*5; *Eddy*, 919 F.2d at 750-751; *Berlin* v. *Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-1164 (6th Cir. 1988); *Local Union 2134* v. *Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987).[21]

3. A misstatement can constitute a fiduciary breach, of course, only if made by a fiduciary. ERISA expressly permits an employer to serve as a fiduciary of its benefits plans. 29 U.S.C. 1002(14)(C), 1108(c)(3). The Act reconciles the conflicting interests inherent in that arrangement by considering the employer to be a fiduciary only

> *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee * * * with respect to any moneys or other property of such plan, or * * * (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. 1002(21)(A) (emphasis added). When an employer that serves as a plan fiduciary is not acting in its fiduciary capacity, it is not subject to the Act's fiduciary constraints. See, *e.g.*, *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155,

[21] As noted, p. 21, *supra*, at common law, an intentional misstatement by a trustee in the context of a transaction between the trustee and the beneficiary rendered the transaction voidable by the beneficiary. In this case, the judgment mirrored that result. The court of appeals effectively voided the Retired Class members' consents to transfer to the MCC Plan by requiring petitioner to pay them the benefits they would have been paid had they retired under the M-F Plan, and to reinstate them into the M-F Plan. Pet. App. 18a-19a.

1161 (3d Cir. 1990); *Berlin*, 858 F.2d at 1162-1163; *Powhatan Fuel*, 828 F.2d at 713-714. For instance, an employer may act in its own self-interest (*i.e.*, not "solely in the interest of the participants and beneficiaries") when it decides whether to adopt, modify, or terminate a welfare plan, because it makes those decisions as sponsor, not fiduciary. *Curtiss-Wright*, 115 S. Ct. at 1228. The court of appeals thus correctly observed (Pet. App. 12a-13a) that "not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company, the assets of the plan, or the interests of plan beneficiaries."

In determining whether an employer's representations are subject to fiduciary standards, the relevant inquiry is whether the representations were made within the scope of the employer's exercise of "discretionary authority or discretionary responsibility in the administration of [the] plan." 29 U.S.C. 1002(21)(A)(iii). Petitioner agrees with that formulation. Pet. Br. 31-32. In some circumstances, however, it might be difficult to determine whether an employer is engaged in plan administration, because the employer may communicate regarding a matter, and/or in a context, that implicates both its interests as employer and its role as plan fiduciary. In petitioner's view, this case raises none of those difficulties because, irrespective of context, the misstatements at issue in this case cannot, they contend, be actionable as breaches of fiduciary duty. We disagree.

Petitioner argues (Pet. Br. 30-36) that it had the right, under ERISA, to terminate or amend its welfare benefit plans at any time, that it disclosed that right to the plans' participants and beneficiaries, and that it therefore may not be held liable under ERISA for misstatements relating to the likelihood of future benefits. Contrary to petitioner's

assertion, however, the district court found that petitioner did not fulfill its obligation to disclose its right to amend or terminate its welfare benefit plans.[22] But even if it had, the right to eliminate benefits by formally terminating or amending a plan through the prescribed procedures (see *Curtiss-Wright*, 115 S. Ct. at 1228-1229) does not license the sponsor to deprive participants or beneficiaries of those benefits through unlawful means. Petitioner may have had the right to terminate respondents' welfare benefits by amending the M-F Plan, but it did not have the right to dupe them into giving up those benefits.[23]

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[22] The district court acknowledged that petitioner reserved the right to amend or terminate benefits under Section 7.4 of the formal Plan document, Pet. App. 66a, but found that it failed to disclose its right to terminate retirees' benefits in its summary plan description (*You & M-F*), *id.* at 66a-67a, 72a, and did not disclose that right adequately in its 1983 summary of material modifications, *id.* at 75a-76a, 111a. Section 102(b) of ERISA, 29 U.S.C. 1022(b), and 29 C.F.R. 2520.102-3 require that a summary plan description include information concerning "the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." Because plan termination may result in the denial or loss of benefits, a summary plan description must include "a summary of any plan provisions governing the rights of the plan sponsor or others to terminate the plan, and the circumstances, if any, under which the plan may be terminated." Office of Pension and Welfare Benefit Programs, U.S. Dep't of Labor, ERISA Tech. Release No. 84-1 (May 4, 1984).

[23] Although the district court found that petitioner misled its employees concerning its intentions to modify the MCC Plan, Pet. App. 64a, the MCC Plan was not in fact modified or voluntarily terminated. Whatever intentions petitioner might have had with respect to such modifications, it ceased providing benefits because MCC went into receivership. Petitioner's statement that "benefit programs w[ould] remain unchanged" (J.A. 75, 80, 82), which the courts below found misleading, was therefore relevant to the award in this case (if at all) only to the extent that it was understood, in context, to reflect

Petitioner also contends (Pet. Br. 37-39) that an employer's statements to plan participants concerning its intentions with regard to future benefits, and any financial projections it makes, can never be subject to fiduciary constraints, because the employer is not, as a fiduciary, affirmatively required to disclose that sort of information. According to petitioner's logic, an employer-fiduciary does not violate its duty of loyalty when it intentionally lies to participants or beneficiaries in an effort to defraud them out of plan benefits so long as the lie does not involve information that a fiduciary is specifically required to provide under the Act's disclosure or reporting provisions. Communications that are not affirmatively required of a fiduciary, however, may nonetheless be within its discretionary authority to administer the plan.[24]

Although the express requirements of the Act provide the basic structure for plan administration, actual plan administration entails countless related tasks. Thus, for example, while the Act requires an administrator to prepare and distribute to all participants and beneficiaries plan descriptions, summary plan descriptions, summaries of material modifications, and annual reports, 29 U.S.C. 1021-1024 (1988 & Supp. V 1993), and to furnish on request statements summarizing an individual's accrued benefits, 29 U.S.C. 1025 (1988 & Supp. V 1993), an administrator may supplement those materials with additional information

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petitioner's expectation that MCC "would remain" solvent, and thereby retain the ability to afford the current level of benefits.

[24] Cf. *Unisys Corp.*, No 94-1875, 1995 WL 380983, at *6 ("[S]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.").

relating to the plan, and may (and generally will) respond to specific employee concerns through additional writings, meetings, or conversations with individual employees. To the extent that the employer intentionally misleads participants or beneficiaries in the context of such communications, its misrepresentations partake of overreaching and abuse of trust, and the employer is correctly found to have breached its duties as a plan fiduciary. See *Berlin*, 858 F.2d at 1163; *Powhatan Fuel*, 828 F.2d at 714.[25]

The subject matter of a representation will naturally bear on the determination whether it should be treated as having been made by the employer in a fiduciary capacity. A statement purporting to describe current benefits, for example, will almost invariably be viewed as emanating from the employer in its capacity as plan administrator, because describing current benefits falls within the scope of a plan administrator's express statutory duties. A statement regarding future benefits could be viewed either way—as a statement by a settlor of its intent (non-fiduciary), or as a statement by an administrator as to the likelihood that current benefits will continue (fiduciary).[26] A statement relating to the employer's financial condition

[25] Petitioner's amici concede that informal discussions and/or interpretations respecting plan benefits fall within the scope of plan administration, see Kodak Br. 23, and that, under Section 404(a)(1), "[a] plan administrator who is expressly granted the authority to interpret a benefit plan may not deliberately or negligently misapply [its] terms or contents * * * when specifically requested by a participant to interpret the plan or communicate its contents," Chamber Br. 18.

[26] The fact that an employer makes decisions with respect to future benefits in its capacity as settlor does not mean that it is always reasonably understood to communicate its intentions with respect to those decisions in its capacity as settlor, no matter in what context the communication is made. Disclosure to plan participants of matters relating to benefits is, after all, a core fiduciary function.

will ordinarily not be viewed as a fiduciary representation. In making those determinations, however, a court should look beyond whether a representation specifically references the plan, and take account of the overall context of the representation, considering, for example, the role of the speaker within the company,[27] the impetus and/or stated reason (if any) for the communication, and the content of other statements made in the course of the relevant communication.[28]

4. In this case, although petitioner was urging its employees to make an employment decision, it was at the same time, for its financial benefit, urging those employees (who had expressed concerns respecting their benefits) to give up their rights as participants in the M-F Plan. In the

[27] Although a statement about the employer's financial condition may not raise ERISA concerns if made by the chief financial officer in the context of a financial report, the very same statement may be subject to fiduciary strictures if made by the benefits supervisor in response to employees' concerns relating to the security of their unfunded benefits.

[28] The law applies a similar context-sensitive approach to duality in other, more familiar, circumstances. For example, not every conversation between a lawyer and his client is protected by the attorney-client privilege. Rather, courts examine the overall context of a conversation to determine "whether the client reasonably understood the conference to be confidential." See *Kevlik* v. *Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984), quoting E.W. Cleary, *McCormick's Handbook of the Law of Evidence* § 91, at 189 (2d ed. 1972). Similarly, in determining whether communications by in-house counsel are privileged legal communications or non-privileged business communications, courts look to context to determine the capacity in which the communications were made. See, *e.g.*, *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d 1201, 1205-1206 (8th Cir.), cert. denied, 459 U.S. 1017 (1982). "While such a 'case-by-case' [analysis] may to some slight extent undermine desirable certainty * * *, it obeys the spirit of the Rules." *Upjohn Co.* v. *United States*, 449 U.S. 383, 396-397 (1981).

course of its 30-minute presentation, petitioner presented the employees with written summaries of current benefits under the M-F and MCC Plans, and told the employees that their acceptances were required to ensure uninterrupted benefits. At the same time, and without signalling any shift in its capacity, petitioner represented that, after the transfer, the employees' benefits would remain unchanged, and that the obligor of the new benefits program—MCC—was a financially viable entity. Although statements of the latter sort might not generally fall within the scope of plan administration, in this case those statements were, by design, intertwined with petitioner's communications respecting current benefits. Since petitioner intentionally conflated its roles as employer and fiduciary—and because petitioner has not sought in this litigation to divide the 30-minute session and accompanying written materials into fiduciary and nonfiduciary components and to establish that respondents' injuries are appropriately attributable to the latter, cf. *Waters* v. *Churchill*, 114 S. Ct. 1878, 1891 (1994) (plurality opinion of O'Connor, J.); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977)—the court below reasonably held petitioner liable for breach of fiduciary duty for misrepresentations made in that session and in the accompanying materials.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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